

What one trial court judge would like you to know

Limiting distractions and maximizing your case

Distractions always take away from the merits of your case. Limit or eliminate distractions. They adversely affect good direct or cross examination. They *misdirect* our attention. They leave a bad taste in a trial court judge's mouth, and that is not a good thing. Here are some thoughts and suggestions that may assist you in your presentation before a family court judge.

Inappropriate clothing

I don't care whether your witnesses are blue- or white-collar workers, but a collar would be nice. A muscle shirt is not impressive, nor is cleavage or a butt crack. Do you really expect me to give much credibility to someone with a pierced eyebrow that can't look me in the eye? Tell your clients and have your clients tell their witnesses (*you* should do this yourself with a form letter to prospective witnesses that tells them what to wear and insists on truth telling and – *if they don't know something* – advises them to say, "I don't know") that dressing for court is not like throwing something on to run to Wal-Mart, Hooters or the local watering hole. Am I going to favor a witness in a suit over a witness in a blue work shirt with "Steve" on the pocket? *Absolutely not.* However, if your star witness looks like he has just gotten out of bed and has slept in the clothes he's been wearing for the past five days, he had better have some compelling testimony!

Inappropriate behavior

Imagine what it looks like from our perspective if your client is staring daggers at the adverse party and your client's family is in the back of the courtroom doing the "wave" every time your client makes a sarcastic comment about his or her ex *and* "booing" and "hissing" when the other attorney tries to ask a ques-

tion. I am not making this stuff up! We have all been there. I am no stickler, but lounging in the witness chair is not appropriate, nor is sparring with the other attorney. The bottom line is that if I am distracted I am not concentrating on your presentation and that is not a good thing – for you. You can never go wrong by instructing your witness to look at the person asking the question, listen to the question, make eye contact with the judge ... and answer the question. Making sarcastic comments or looking at your ex with the "I could kill you with my bare

hands" stare is not impressive. It suggests anger and bitterness, and just maybe I'll start believing that your client is the problem after all.

Unnecessary objections

A hearsay objection to a background question that is not really germane to the issues before the court is not a healthy objection to make. Interrupting the other attorney's examination by saying, "Excuse me, your honor, may I ask a question for purposes of making an objection," translates to me as, "Oops, he is hurting my case, and I want to object, but I am not sure what the objection is." Try, "Objection, Your Honor, lack of foundation." At least that is an objection.

Unnecessary witnesses

Sometimes I hear a witness testify, and I am thinking, "Is that all? Where's the beef?" Sometimes I swear I can hear *your* mind churning after your witness steps down from the stand, and it's saying, "Wow, that was a waste of time. I hope the judge wasn't listening!" Finally, if you are asking your client, "Who's next?" or "How do you pronounce his name?" (when *he* is a *she*), you just told me you have never really spoken to this witness, and you don't have a clue what he/she is going to offer as testimony.

What I would rather not hear in the courtroom (aka common distractions)

- After hearing opposing counsel say that she doesn't have a copy of Petitioner's Exhibit 1, you say, "It's in that box I sent you." *That is not the right answer.* The better answer is, "I'm sorry, I sent that to you last week in an effort to exchange exhibits prior to the hearing, but I have another copy for you and an extra copy for the judge."
- In response to an objection as to the admissibility of a document, someone says, "It was part of discovery" or "Gee, you sent it to me in discovery." This translates to: "Duh, isn't all discovery admissible automatically?" *Duh, no.*
- Any trite, sarcastic, demeaning or editorial response to an attorney's question by a witness.
- Any trite, sarcastic, demeaning or editorial response to an attorney's question by an attorney.
- Counsel cross-examining by saying, "If I were to tell you [fill in the blank], would you agree?" *Certainly, we can do better than that.*



Judge Steven H. David
Boone Circuit Court
Lebanon, Ind.

(continued on page 42)

- An attorney saying, “I only have one copy of this exhibit ...” as if to say, “Sorry Charlie, the ball is mine, and I am not sharing!” Or “Gee, where did this exhibit come from?”

- Your witness saying things like, “You can make it right, Judge, by [fill in the blank with an absurdity]” or “I pray to God that you will [fill in the blank with revenge in your heart]” or “I have it all at home, and I can go get it.” Or my personal favorite: “Well, you can check it out for yourself, Judge.”

Exhibits

Share them in advance. Consider giving the judge a list of prospective exhibits at the outset of the hearing – just a list of “potential exhibits” with a brief description. You can always add to it, but it gives me a checklist and makes my court reporter happy, and it tells me you have thought this through before you came in the courtroom. An extra copy of some of the more complex or lengthy exhibits (especially with financial

information) is extremely helpful and allows me to mark on the exhibit (as it is mine, not the court reporter’s or file copy). And it gets put with my notes, so when I am reviewing the case and drafting my decision, I have your exhibits with my notes in front of me – and that should be a good thing for you.

If you need to offer an exhibit at trial that was not previously provided to opposing counsel, say, “Your Honor, I am offering Respondent’s Exhibit G, and I am providing a copy to counsel. I have not previously provided such to him or her.” Then tell me why, so I don’t think you are being a jerk. *I know it is a dog-eat-dog world, but don’t wear milk bone underwear.*

Children

Don’t bring them in the courtroom to testify unless you have discussed this in advance with the judge. Don’t assume that if the court has granted an *in camera* interview that it will happen immediately before or after the hearing.

Treat the GAL or CASA with respect. They are normally volunteers. You can cross effectively without being a jerk.

At the end of the hearing

At the end of the hearing (or during the hearing), give the trial court judge a checklist of issues that need to be addressed and/or your client’s requested relief in paragraph form. It is helpful to give suggested language or a proposed order on disk or in a manner the judge prefers.

Remember, we are lawyers too. We respect lawyers. We admire lawyers. My advice to the family law lawyer is very simple – be an advocate. We will listen to you. Be prepared. It pays dividends. Do your best to represent your client, but treat your fellow attorneys with respect. Lawyer hard, but lawyer fair. Don’t play games. Don’t bully. 🐶

Editor’s Note: An earlier version of this article first appeared in Family Matters, the ISBA Family & Juvenile Law Section newsletter, Spring 2007.